Supreme Court, U.S.
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No. 91-1541

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN W. EWING, et al.,
Petitioners,

vs.

CITY OF CARMEL-BY-THE-SEA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is it an impermissible taking under the Fifth Amendment to the United States Constitution for a City to adopt a zoning regulation that prohibits use of single-family dwellings in residential districts as short-term or vacation rentals?

2. Is a zoning ordinance which (i) prohibits use of single-family dwellings in residential districts as short-term or vacation rentals and (ii) regulates the relationship between a property owner and tenant by establishing a minimum tenancy for dwellings rented in a single-family residential zoning district, reviewable under the heightened scrutiny standard discussed in *Nollan v. California Coastal Commission*?

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of the Case	1
Reasons Why the Petition Should be Denied	3
I	
The Court Of Appeal Properly Used The Rational Basis Standard For Judicial Review Of A Non-Possessory Land Use Regulation	3
II	
Local Legislative Bodies May Adopt Zoning Regulations That Indirectly Regulate The Landlord-Tenant Relationship By Restricting Short-Term Or Vacation Rental Units To Commercially Zoned Properties	5
III	
Lower Courts Have Not Reached Conflicting Decisions On The Standard Of Review Applicable To Facial Challenges Of Land Use Regulations	7
Conclusion	8

TABLE OF AUTHORITIES

Cases

	Page
Adolph v. Federal Emergency Management Agency, 854 F. 2d 732 (5th Cir. 1988)	3
Commercial Builders v. Sacramento, 941 F. 2d 872 (9th Cir. 1991)	3
Euclid v. Ambler Realty Company, 272 U.S. 365 (1926)	4, 5, 7
Fisher v. City of Berkeley, 475 U.S. 260 (1986)	6
Keystone Bituminous Coal v. DeBenedictis, 480 U.S. 470 (1987)	4
Lindsey v. Normet, 405 U.S. 56, (1972)	5
Naegele Outdoor Advertising Inc. v. City of Durham, 844 F. 2d 172 (4th Cir. 1988)	3
New Orleans v. Duke, 457 U.S. 297 (1976)	4
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	1, 3, 4, 5
Penn Central Transportation Co. v. New York City, 438 U.S. 107 (1978)	4
Pennell v. City of San Jose, 485 U.S. 1 (1988)	4, 6
Reitman v. Mulkey, 387 U.S. 369 (1967)	6
St. Bartholomew's Church v. City of New York, 914 F. 2d 348 (2nd Cir. 1990)	3
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	7
Woods v. Clyd W. Miller Co., 333 U.S. 138 (1948)	6
Yee v. City of Escondido, 60 U.S.L.W. 4301 (U.S. April 1, 1992) (No. 90-1947)	7

Other Authorities

California Govt. Code Section 65100 et seq.	2
Carmel Municipal Code Chapter 17.24	2
(1989) Wis. L. Rev. 925	6

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Carmel-by-the-Sea, a municipal corporation ("Respondent" or "Carmel"), respectfully requests that this Court deny the petition for certiorari, seeking review of the opinion of the Court of Appeal of California, Sixth Appellate District, in this case. That opinion is reported at 234 Cal. App. 3d 1579 (1991).

STATEMENT OF THE CASE

Petitioners seek review of the decision of the California Court of Appeal in this case on the basis that this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), requires California courts to apply heightened scrutiny when reviewing a land use ordinance challenged under the Fifth Amendment to the United States Constitution. Respondent disagrees, and submits that the Court of Appeal correctly upheld

the Ordinance using the rational basis standard and that there is no federal question at issue.

The City of Carmel-by-the-Sea enacted Ordinance No. 89-17 as a part of its comprehensive zoning scheme and pursuant to its 1988 Revised General Plan.[1]

The purposes of the Ordinance are (i) to prohibit single-family homes from use as short-term or vacation rental units, (ii) to maintain the residential character and stability of the R-1 district[2] and (iii) to preserve existing permanent housing within the City. Absent this regulation, the City's R-1 district would confront increasing conversion of permanent housing into short-term rental units and encroachment by non-residential uses.

To accomplish the City's land use objectives, the Ordinance designates rental uses for less than 30 days in length as a commercial land use. Month-to-month or longer term rentals are deemed residential uses and are not subject to local regulation. This distinction between residential and transient/commercial rental uses enables the City to maintain separate zoning districts for each kind of use—including visitor accommodations—within the city. The record below indicates that some 950 lawful transient units exist (between bed and breakfast, hotel, motel and similar establishments) within Carmel which has a population of under 5,000 persons. (App. A to Petition, p. 12.)

Petitioners own single-family dwellings in the R-1 district which they rent on a daily or other short-term basis. These rental uses are transient lodging businesses operating as residentially zoned properties. Contrary to this Ordinance and pre-existing zoning regulations, Petitioners seek business profits from single-family home ownership. Petitioners claim that because their properties are located in the R-1 district, any kind of tenancy—including overnight rentals—is a residential use not subject to municipal zoning regulation. This claim ignores the obvious

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[1] Calif. Govt. Code § 65100 et seq.

[2] The purpose of Carmel's R-1 district is to provide an area for permanent single-family residential uses and permitted home occupations. See Carmel Municipal Code Chapter 17.24.

distinction between residential and commercial uses, and the equally obvious difference between a private home and a house held out to the public as a vacation rental unit.

The Court of Appeal reviewed the Ordinance using the rational basis standard. The court below rejected each of Petitioners' claims and upheld the decision of the trial court that Ordinance No. 89-17 was a valid land use regulation. The California Supreme Court declined review and this petition followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I

The Court Of Appeal Properly Used The Rational Basis Standard For Judicial Review Of A Non-Possessory Land Use Regulation

Petitioners contend that a land use regulation challenged as a regulatory taking must be reviewed using the heightened scrutiny standard discussed in *Nollan v. California Coastal Commission,* supra.[3] This demand for heightened or strict scrutiny is grounded on (i) an erroneous assumption that *Nollan* requires strict scrutiny in all regulatory takings cases and (ii) incorrect extension of the factual and legal setting of the *Nollan* case,which involved a physical taking of property in the form of a permit condition, to a facial challenge to a land use ordinance.

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[3] Recently, the Ninth Circuit rejected application of strict scrutiny in a regulatory taking claim in *Commercial Builders v. Sacramento,* 941 F. 2d 872 (9th Cir. 1991), holding that strict scrutiny was applicable only in physical takings cases where no evidence exists of a nexus between the exaction and the proposed development. Other circuits have also rejected application of heightened scrutiny to nonpossessory takings cases. See *St. Bartholomew's Church v. City of New York,* 914 F. 2d 348 (2nd Cir. 1990); cert. denied sub nom. *Committee to Oppose Sale of St. Bartholomew's Church v. Rector,* ____ U.S. ____ (1991); *Adolph v. Federal Emergency Management Agency,* 854 F. 2d 732, 737 (5th Cir. 1988); and *Naegele Outdoor Advertising, Inc. v. City of Durham,* 844 F. 2d 172, 178 (4th Cir. 1988).

The gist of Petitioners' claim is that the Court of Appeal ". . . ignored *Nollan's* clear instruction that courts must exact land use regulations to heightened scrutiny . . . ." (Petition at 9.) This proposition is simply wrong and incorrectly states the limited circumstances in which heightened scrutiny may be applicable.

The Court of Appeal used the rational basis standard because no Federal or California court has decided that heightened scrutiny is required in a regulatory takings case, and Petitioners cited no authority for their proposition beyond *Nollan*. Since this Court's decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the rational basis standard has been the accepted standard of review in zoning cases. *Id.* at 386.

While *Nollan* discussed the need for a "substantial" nexus between a permit condition or exaction and the burden placed on the property owner, it did not renounce the rational basis standard in cases such as this.

In two similar subject cases decided after *Nollan*, this Court declined to apply strict scrutiny. First, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court upheld a residential rent control and eviction ordinance adopted by the City of San Jose finding it rationally related to its stated purposes (quoting *New Orleans v. Duke*, 457 U.S. 297, 303 (1976)). Likewise, in *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470 (1987), this Court rejected the notion that "courts have a license to judge the effectiveness of legislation, or that courts are to undertake [a] 'least intrusive alternative' analysis . . . ." *Id.* at 487 n. 16.

Examination of the purpose and scope of City Ordinance No. 89-17 discloses that it falls well within the ambit of traditional zoning regulations long held reviewable using the rational basis standard. The Ordinance does not involve a physical taking, exaction or permit condition. Far from being a new kind of development restriction or a regulation affecting only a small class of property owners, this Ordinance is a standard use restriction of the type discussed by Chief Justice Rehnquist's dissenting opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 107, 139-140 (1978). Chief Justice Rehnquist distinguished between a zoning case and a takings case on the basis of the

breadth of the restriction and whether the burden was placed on a single property or on all property owners similarly situated. A uniform use restriction was held to not effect a taking since no benefit accrues to the public generally at the expense of a single property owner. Likewise, this Ordinance imposes no such burdens.

The effect of this Ordinance is to merely limit short-term rentals to properties zoned for commercial uses. This is a necessary and valid land use distinction. Moreover, the Ordinance does not affect long-term rental uses nor infringe on owner-occupancy of single-family dwellings. Neither is the Ordinance limited to specific properties, except that Petitioners' properties are among those which are the cause of the problem which the City seeks to cure. The uniform application of the Ordinance to the entire R-1 district creates an uphill burden to any due process or equal protection challenge. Petitioners have clearly not satisfied this burden.

Since no California or Federal court has held that a land use regulation, such as City Ordinance No. 89-17, is *de facto* reviewable—post *Nollan*—under a strict scrutiny standard absent a showing that the challenged regulation is also flawed on other grounds, review of the opinion below is not needed.

II

Local Legislative Bodies May Adopt Zoning Regulations That Indirectly Regulate The Landlord-Tenant Relationship By Restricting Short-Term Or Vacation Rental Units To Commercially Zoned Properties

This Court has long recognized that the landlord-tenant relationship is itself subject to extensive state and local regulation. See, e.g., *Lindsey v. Normet,* 405 U.S. 56, 72 (1972). These regulations fall into two broad classes. First, land use regulations often provide separate zoning districts for single-family dwellings, multi-family housing units, senior citizen housing and short-term or vacation lodgings based on local criteria. See *Euclid v. Ambler Realty Co.,* supra Second, the government may regulate rents, health and safety conditions, selection of tenants and other

aspects of the leasehold. See *Pennell v. City of San Jose,* supra; *Fisher v. City of Berkeley,* 475 U.S. 260 (1986).

In this case, the City's need to distinguish single-family residential use from commercial uses, such as a short-term or vacation rental units, arises from the City's goal that its R-1 district be maintained for its intended purpose—a zone for single-family residences free from commercial uses. This most fundamental zoning objective required the City to establish criteria for classifying short-term versus long-term rental uses. The City Council adopted 30 days as the dividing line between these two uses, and only in this limited manner does the Ordinance touch the landlord-tenant relationship.

The principal issue here is not residential uses per se, but rather in which zone can each category of use be established. On that basis alone, the Court of Appeal correctly set aside Petitioners' argument that Ordinance No. 89-17 restricts "residential" uses.

Petitioners have also not overcome the argument that ". . . a property owner who voluntarily enters the rental housing market necessarily yields a modicum of control." Manheim, *Tenant Eviction Protection and the Takings Clause,* (1989) Wis. L. Rev. 925, 1002. And as this Court noted in *Reitman v. Mulkey,* 387 U.S. 369, 385-386 (1967), property placed in the public domain is subject to regulation. Having decided to rent their properties, Petitioners cannot then argue that these properties retain the characteristics of a private home. And indeed the effect of this Ordinance on the property owner is less intrusive than rent control or other economic regulations upheld by this Court.

Likewise, Petitioners' contention that "[t]he decision below grants municipalities unfettered authority to limit residential use of property simply by designating it as commercial use" is equally false. (Petition at 10.) While Petitioners' indirectly assert that the Ordinance violates due process and equal protection safeguards, the government is free to select only those areas or classes of property where the need for regulation exists, without running afoul of these protections. *Woods v. Clyd W. Miller Co.,* 333 U.S. 138, 145 (1948).

Lastly, the Court of Appeal did proceed with an ad-hoc factual inquiry into the purposes and means of the Ordinance. The court below concluded that the Ordinance was entirely consistent with accepted Federal and California decisions in this Field. No federal authority has been cited by Petitioners which casts doubt on the opinion below, and the California Supreme Court declined to review the case.

Carmel's regulatory efforts in this field are nothing new. The Court of Appeal correctly determined that the Ordinance's purposes and means were legitimate exercises of the City's police powers.

III

Lower Courts Have Not Reached Conflicting Decisions On The Standard Of Review Applicable To Facial Challenges Of Land Use Regulations

Lower courts have not reached conflicting decisions with respect to (i) use of the rational basis standard in regulatory takings cases nor (ii) whether a zoning regulation which restricts, but does not eliminate, a property owner's economic use of his property is a taking or not.

In upholding City Ordinance No. 89-17, the Court of Appeal correctly applied rules of construction and analysis established by this Court in decisions ranging from *Euclid v. Ambler Realty Co.*, supra, through *Village of Belle Terre v. Boraas*, 416 U.S. 1 1974, and most recently, *Yee v. City of Escondido*,60 U.S.L.W. 4301 (U.S. April 1, 1992) (No. 90-1947). In each case, this Court upheld the broad authority of state and local government to establish zoning districts, decide on which uses are appropriate to each district and to regulate housing conditions.

Petitioners have not cited any authorities which suggest that Federal or State courts have reached conflicting decisions on the subject matter of this case, nor on any federal question decided by the Court of Appeal.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated: April 17, 1992

Respectfully submitted,

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